Supreme Court, U.S.
FILED
JAN 12 1983
ALEXANDER L. STEVAS
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No. 82-809

In the Supreme Court of the United States

OCTOBER TERM, 1982

LARRY TABELING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was unlawfully seized during his encounter with DEA agents at an airport.

2. Whether the prosecution impermissibly called attention to petitioner's "silence" after he was given *Miranda* warnings.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1982. A petition for rehearing was denied on September 27, 1982 (Pet. App. 1b). The petition for a writ of certiorari was filed on November 15, 1982. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following denial of petitioner's suppression motion and a jury trial in the United States District Court for the Central District of Illinois, petitioner and co-defendant Samuel F. Jones were convicted of conspiring to distribute marijuana (Count 1) and cocaine (Count 2), in violation of 21 U.S.C. 846.[1] Petitioner was sentenced to a five-year term of imprisonment on Count 1, to run concurrently with a 10-year term on Count 2. He was also fined $5,000 on each count. The court of appeals affirmed.

1. The evidence adduced at trial showed that in early 1978 petitioner and co-defendant Jones were co-owners of a tropical plant store in Champaign, Illinois, called "The Plant Connection." In addition to purveying tropical plants, petitioner also used the premises to sell large quantities of marijuana to local distributors. Steve Beck, a supplier, commonly purchased 25-30 pounds of marijuana a week, which he repackaged and sold to regular customers such as Gary Kaganowich. Kaganowich in turn distributed the marijuana to his own customers (Tr. 137-139, 140-141, 467, 471). Beck regularly took the proceeds of his drug transactions to "The Plant Connection" and gave them to an employee, Angela Blair (Tr. 161-162, 325). Blair often gave marijuana or cocaine filled packages to callers at the store, and she noticed that some of the store's clientele were not there to purchase plants (Tr. 319, 321-329, 343). Later in 1978, petitioner decided to switch his "business" from

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[1] Co-defendant Jones' petition for a writ of certiorari, No. 82-846, was denied on January 10, 1983.

marijuana to cocaine sales because cocaine is less bulky. Beck began purchasing cocaine from petitioner and reselling it to Kaganowich and other customers (Tr. 151-152, 473-474). On several occasions, Beck picked up cocaine from Jones' apartment for which he paid Jones directly (Tr. 180-183).

During the fall of 1978, Beck told petitioner and Jones that he planned to turn his "business" over to Kaganowich (Tr. 154-155). During a plant sale held by the store, Beck identified petitioner and Jones to Kaganowich as his marijuana suppliers (Tr. 472). At a later meeting attended by Beck, Kaganowich, petitioner, and Jones, Kaganowich outlined the amounts of cocaine he thought he could distribute and his planned mode of payment. Petitioner and Jones agreed to supply the requested amounts in advance of payment but promised a more favorable price for a cash transaction. Kaganowich thereafter obtained his cocaine supplies from petitioner and Jones (Tr. 477-479).

2. Prior to trial, petitioner moved to suppress $38,000 in currency that had been seized from him during an encounter with federal agents on March 21, 1978, at the Denver airport. The evidence adduced at the suppression hearing showed that on March 21, 1978, plainclothes DEA agent Ron Weaver, stationed at the Denver airport, received a call from police Sgt. Skip Pearson in Miami, Florida. Pearson related that a suspected transporter of cocaine was en route from Miami to Denver. Pearson told Weaver that he had observed the suspect purchasing a one-way ticket just 10 minutes before flight time, and that the suspect had boarded the flight without checking any luggage; moreover, the individual had boarded only at

the last minute, after walking slowly down the concourse toward the plane, reversing direction several times en route (S.H. Tr. pp. 15-17)[2] Weaver briefed his supervisor and two cooperating Denver police officers on the information he had received, then proceeded to the arrival gate. Based on Pearson's description, Weaver recognized petitioner when he deplaned. As petitioner proceeded up the concourse, he varied his walking speed, occasionally reversing direction, or stopping to look around. Agents followed petitioner into the main concourse, where he placed a phone call at a public telephone. When one agent went to the pay phone adjacent to that occupied by petitioner, petitioner hung up, moved to another phone booth, and placed another call. During the course of this second call, petitioner turned his back or put his head down each time anyone walked by (S.H. Tr. 17-20).

Upon completing his call, petitioner went to a taxi stand. Agent Weaver then approached petitioner, identified himself, and asked petitioner if he would accompany him to an airport security office about 30 yards from the taxi stand. Agent Weaver testified that this was a request, not a direction, that he had been prepared to allow petitioner to proceed on his way, and that he made clear to petitioner that no compulsion was involved. Petitioner agreed to accompany the agent and did so (S.H. Tr. 17-20, 34).

Although petitioner had not been arrested, he was administered *Miranda* warnings. The agents then asked him for identification. Petitioner responded that he did not have any identification, but tendered

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[2] "S.H. Tr." refers to the transcript of the suppression hearing.

his ticket and other documents (S.H. Tr. 20-21)[3] The agents then inquired as to the contents of his suitcase. Petitioner volunteered "You're free to look inside." When the agents opened the suitcase, they found $38,000 in currency wrapped inside petitioner's sneakers and clothing. When asked the amount of money inside the suitcase, petitioner replied, "a few thousand dollars," hesitated briefly, and then said "$38,000." Petitioner denied that the money belonged to him, but declined to reveal its owner. At this point, the agents advised petitioner that they were contacting the Internal Revenue Service concerning any interest it might have in the unexplained cash. Shortly thereafter an IRS agent arrived and interviewed petitioner. Petitioner continued to deny ownership of the money. The agents took possession of the cash and gave petitioner a receipt. Petitioner was then advised that he was free to leave with all his personal possessions (S.H. Tr. at 21-23).

After the evidentiary hearing the magistrate denied the suppression motion. The magistrate's decision was adopted by the district court (Tr. 361-362). In a brief judgment order designated as not for publication or citation, the court of appeals rejected petitioner's claim that the evidence was fruit of an unlawful search and seizure of his person, relying upon its prior opinion in *United States* v. *Black*, 675 F.2d 129 (1982), petition for cert. pending, No. 81-2239 (filed June 3, 1982).

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[3] The ticket was issued in petitioner's name. Among the documents tendered, however, was a hotel receipt issued in the name "Sam Jones." When asked who Sam Jones was, petitioner replied "That's me sometimes" (Tr. 354-355, 371).

ARGUMENT

1. Petitioner's contention (Pet. 9-13) that he was unlawfully seized during his encounter with law enforcement officials is without merit.

In its decision in *United States* v. *Black*, *supra*, invoked by the court of appeals as the basis for rejection of petitioner's contention, the court of appeals concluded that no seizure subject to the Fourth Amendment occurs when contact between law enforcement officials and an individual is consensual—i.e., in circumstances in which a reasonable person would not conclude that his or her liberty was constrained. 675 F.2d at 132-134. This standard is consistent with the applicable decisions of this Court and of the courts of appeals. This Court has recognized that not every contact between a citizen and a police officer constitutes a seizure within the meaning of the Fourth Amendment. On the contrary, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968); see also *id.* at 32-33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring); *Sibron* v. *New York*, 392 U.S. 40, 63 (1968). As Justice Stewart explained in his opinion in *United States* v. *Mendenhall*, 446 U.S. 544, 554-555 (1980) (footnotes omitted):

> [A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the dis-

> play of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. * * * In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.[4]

Like the Seventh Circuit in *Black* and this case, the courts of appeals have uniformly adopted the standard endorsed by Justices Stewart and Rehnquist for determining whether or not a seizure has taken place.[5] Indeed, petitioner does not quarrel with that

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[4] In *Mendenhall*, a majority of the Court did not reach the question addressed in Justice Stewart's opinion. Justice Powell, with whom the Chief Justice and Justice Blackmun joined, concluded that the encounter in that case, if a seizure, was supported by reasonable suspicion. 446 U.S. at 560. These Justices, who together with Justices Stewart and Rehnquist made up the majority upholding the lawfulness of the encounter in *Mendenhall*, intimated no doubt about the standard announced by Justice Stewart, reserving judgment only as to its application to the particular set of facts presented. *Id.* at 560 n.1. Justice White, joined by Justices Brennan, Marshall, and Stevens in dissent, declined to reach the question whether Mendenhall had been seized, but the doubts he expressed pertained only to the application of the standard outlined by Justice Stewart to the facts of that particular case. *Id.* at 570 & n.3.

[5] See *United States* v. *Moore*, 675 F.2d 802, 807-808 (6th Cir. 1982), petition for cert. pending, No. 82-587 (filed Sept. 10, 1982); *United States* v. *Beale*, 674 F.2d 1327, 1329-1330 (9th Cir. 1982), petition for cert. (on a different issue) pending, No. 82-674 (filed Oct. 18, 1982); *United States* v. *Elsoffer*, 671 F.2d 1294, 1297 (11th Cir. 1982); *Gomez* v. *Turner*, 672 F.2d 134, 140-141 (D.C. Cir. 1982); *United States* v. *Berry*, 670 F.2d 583, 595 (5th Cir. 1982) (en banc); *United States* v. *West*, 651 F.2d 71, 72 (1st Cir. 1981), petition for cert. pend-

standard; rather he invokes it and relies upon it (Pet. 10, 11, 12). Accordingly, no question as to the fundamental principles that distinguish consensual police-citizen encounters from seizures is presented here.

b. The petition instead presents the fact-bound question whether the above-mentioned standard was properly applied to the facts of this case. That question does not warrant further review; in any event, the court of appeals' decision is correct.

Here, as in *Mendenhall*, 446 U.S. at 555 (opinion of Stewart, J.), petitioner's encounter with police began in a public area. Nor is there any claim or evidence that the agents wore uniforms, displayed weapons, or touched petitioner's person or otherwise exercised authority over him. On the contrary, the uncontradicted testimony of Agent Weaver was that petioner was given to understand that cooperation was at his option (S.H. Tr. 34). Under the circumstances, there is no need to consider petitioner's claims (Pet. 10-12) that the atmosphere in which he was questioned was coercive. Similarly irrelevant is petitioner's observation (Pet. 10-11) that the encounter in Denver was not a random one. The fact that police have some ground for suspecting an individual of criminal activity, which may or may not constitute "reasonable suspicion," does not thereby render an encounter with such an individual a seizure, for the objectively manifested conduct of police rather than their subjective intentions are controlling

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ing, No. 81-307 (filed Aug. 14, 1981): *United States* v. *Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978).

for this purpose. See *Scott* v. *United States*, 436 U.S. 128, 136-137 (1978).

Petitioner's reliance (Pet. 11 n.11) on *United States* v. *Elsoffer*, 671 F.2d 1294 (11th Cir. 1982), is misplaced. In *Elsoffer*, it is true, the court suggested in dictum that retention of an individual's ticket for an undue period of time during interrogation converted the encounter into a seizure.[6] Yet, as the decision of the en banc court in *United States* v. *Berry*, 670 F.2d 583, 597, 603 n.26 (5th Cir. 1982), makes clear, the Eleventh Circuit does not apply a rigid rule requiring immediate return of a ticket in every case, if the encounter is not to be deemed a seizure. The true rule applied is simply that any retention must not assume a form or duration that conveys the reasonable belief that the individual is no longer free to leave. For all that appears here, what was retained was the used stub from the Miami-Denver flight; obviously, whatever inference might be drawn regarding retention of a ticket needed for onward passage has little application in this context. In any event, where, as here, an individual is told at the outset that cooperation is voluntary, any inference of detention that might be drawn from the officer's retention of a ticket during questioning of an individual in other circumstances has no application.[7]

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[6] The *Elsoffer* court actually held that reasonable suspicion had, in any event, arisen by the time of the "seizure."

[7] Petitioner has adduced no record support for his statement (Pet. 5) that his ticket was retained at the end of the encounter. Assuming that the statement is accurate, such retention is of no moment. At that point petitioner was expressly told, once again, that he was free to leave. No independent issue is raised in this Court as to the retention of the ticket, or the $38,000 in cash.

c. Petitioner's reliance (Pet. 11) upon *Brown* v. *Texas*, 443 U.S. 47 (1979), is misplaced. As the excerpt quoted by petitioner (Pet. 11) plainly reflects, the Court did not there address consensual police-citizen encounters. Petitioner's reliance upon *Reid* v. *Georgia*, 448 U.S. 438 (1980), is similarly unavailing. There, the Court did not consider whether the encounter was a seizure vel non, leaving this issue open upon remand. *Id.* at 44 n.*; *id.* at 442-443 (Powell, J., concurring). On remand the state court concluded that no seizure had transpired, *State* v. *Reid*, 276 S.E.2d 617, 621-622 (Ga.), and this Court denied review, 454 U.S. 883 (1981).[8]

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[8] The other court of appeals decisions cited by petitioner also do not conflict with the decision in this case. As the Sixth Circuit has made clear in subsequent cases, the finding of a seizure in *United States* v. *Jefferson*, 650 F.2d 854 (6th Cir. 1981), was based upon the agent's direction at the outset of the encounter that the defendant accompany him to another location. See *United States* v. *Moore*, *supra*, 675 F.2d at 807-808; *United States* v. *Tolbert*, No. 81-1485 (6th Cir. Nov. 11, 1982). The decision in *United States* v. *Patino*, 649 F.2d 724 (9th Cir. 1981), is distinguishable, for the court there relied upon the "clearly erroneous" standard of review, and upon the fact that the defendant, because of her limited command of English, might not have appreciated that she was free to leave. 649 F.2d at 727, 728-729 and n.4. Finally, *United States* v. *Place*, 660 F.2d 44 (2d Cir. 1981), cert. granted, No. 81-1617 (June 7, 1982), does not address the question whether an individual's encounter with law enforcement officers was a seizure. Instead the issue there was whether detention of luggage violated Fourth Amendment requirements.

Petitioner has noted the pendency of *Florida* v. *Royer*, cert. granted, No. 80-2146 (Nov. 30, 1981). We do not believe it necessary to hold the petition here for future disposition in light of that case. The only question necessarily presented in *Royer* is whether the police-citizen encounter there

2. Petitioner also contends (Pet. 7, 13-15) that the government impermissibly elicited trial testimony reflecting a decision on his part to exercise his Fifth Amendment right to remain silent, and that the prosecutor improperly commented upon that decision in his closing argument. This contention is factually unfounded and legally unsound.[9]

During the direct examination of Agent Weaver, the government elicited his account of petitioner's denial of ownership of the $38,000 he was carrying. See page 5, *supra*. Agent Weaver also testified that petitioner had declined to identify the owner of the cash (Tr. 357-358). But no evidence was adduced (nor is any claim now made) that petitioner invoked his Fifth Amendment rights, or that he wished to remain silent or to cease responding to further questions. The jury learned only the bare fact that petitioner had denied ownership of the currency, but had not otherwise identified the owner of the currency at

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escalated into an arrest requiring probable cause. However, the question whether an initial police-citizen encounter was itself a seizure for Fourth Amendment purposes was also briefed and argued in *Royer*. We note that the Court has recently denied certiorari in *Setzer* v. *United States*, No. 82-5409 (Nov. 29, 1982), which presented the seizure vel non issue. The Court appears, however, to be holding several other cases presenting that issue for future disposition. See *West* v. *United States*, No. 81-307 (filed Aug. 14, 1981); *Williams* v. *United States*, No. 81-1278 (filed June 3, 1982). This case differs from those that are currently pending in that petitioner was expressly informed at the outset of his encounter with police that his cooperation was voluntary.

[9] The court of appeals' judgment order indicates that this claim was deemed unworthy of discussion (Pet. App. 2a).

the initial encounter. In testifying on his own behalf at trial, petitioner stated that he had flown to Denver, en route to California, with $38,000 in cash he had intended to use to purchase plants for a forthcoming liquidation sale at "The Plant Connection." He admitted on the stand his denial to Agent Weaver that the money was his, asserting that it belonged to "The Plant Connection" (Tr. 649, 662-663).

The prosecutor's rebuttal argument properly focused exclusively upon the inconsistency between petitioner's denial of ownership to Agent Weaver and his trial testimony. The prosecutor observed (Tr. 828) that petitioner's claim that the money was his

> was so late coming, ladies and gentlemen, that it can't be anything but a complete fabrication.

This case is accordingly controlled by *Anderson* v. *Charles*, 447 U.S. 404, 408-409 (1980), which distinguishes *Doyle* v. *Ohio*, 426 U.S. 610 (1976), upon which petitioner relies. The prosecutor's comment here, like the testimony elicited from Agent Weaver, was "not designed to draw meaning from silence, but to [highlight] a prior inconsistent statement." 447 U.S. at 409. As in *Anderson* v. *Charles*, *supra*, the matter objected to by petitioner, "taken as a whole" (*id.* at 408), cannot fairly be regarded as a comment upon petitioner's exercise of his right to remain silent.[10]

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[10] Because only prior silence rather than a prior inconsistent statement was involved, *United States* v. *Massey*, 687 F.2d 1348, 1351-1353 (10th Cir. 1982), cited by petitioner (Pet. 14-15), is inapposite. *United States* v. *Prescott*, 581 F.2d 1343, 1350 (9th Cir. 1978), holding that an individual's refusal to waive Fourth Amendment rights may not be adduced as evidence of guilt, plainly has no bearing on this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1983

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